MALAYSIA AIRLINE SYSTEM BHD A

v.

WAN SA'ADI WAN MUSTAFA

COURT OF APPEAL, PUTRAJAYA B
CLEMENT SKINNER JCA
ZAHARAH IBRAHIM JCA
MAH WENG KWAI JCA
[CIVIL APPEAL NO: N-02-474-2010]
18 NOVEMBER 2013 C

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application for - Application to quash decision of Industrial Court - Industrial Court dismissed claim for sexual harassment - Whether Industrial Court committed errors of law - Whether justified in excluding respondent from 'in camera' proceedings in Industrial Court* D

LABOUR LAW: *Employment - Dismissal - Sexual harassment by leading steward against crew - Domestic inquiry - Right to fair trial - Cross-examination conducted 'in camera' - Whether there was procedural impropriety in proceedings before Industrial Court - Whether respondent accorded fair hearing* E

The appellant company had employed the respondent as a leading steward. He was alleged to have committed sexual misconduct against the complainant, who was on her maiden solo flight as a F crew. After taking advice from her instructor, the complainant made a written complaint. Following an investigation, the respondent was asked to attend a domestic inquiry, where, by a majority decision, the domestic inquiry panel found the respondent guilty of two charges of sexual harassment. The respondent was G subsequently dismissed. Soon after, the respondent made a representation to the Minister concerned who referred the matter to the Industrial Court, pursuant to s. 20 of the Industrial Relations Act 1967. The Industrial Court, however, dismissed the respondent's claim. Dissatisfied, the respondent applied to the H High Court for judicial review to obtain an order of *certiorari* to quash the award of the Industrial Court. The High Court allowed the respondent's application and held that the Industrial Court had committed errors of law, namely, when it failed to see any justification for precluding the respondent from the *'in camera'* I proceedings before the Industrial Court. The High Court then

made an order to remit the case to the Industrial Court for it to be re-heard. Hence, the present appeal by the appellant. The issues that arose for consideration, *inter alia*, were: (i) whether there was procedural impropriety in the proceedings before the Industrial Court; and (ii) whether the respondent was accorded with a fair hearing even though he was not allowed to remain in the court during the latter part of the complainant's cross-examination.

Held (dismissing appeal; affirming decision of High Court)
Per Clement Skinner JCA delivering the judgment of the court:

(1) In civil proceedings, a presiding judge may for good and valid reasons decide to exclude a person from attending the proceedings. The judge would be justified to exclude such person from proceedings in court if he finds a person is intent on disrupting proceedings or being offensive to the court or anyone else involved in the hearing or is trying to intimidate a witness. However, the Chairman of the Industrial Court gave absolutely no reason for his drastic decision. As such, there was indeed procedural impropriety in the proceedings at the Industrial Court. (paras 17 & 26)

(2) A right to a fair trial will include the right to hear everything which his accuser and anyone else might have to say in support of the accusation against him, so that he has an opportunity to answer them. Here, the respondent was denied that very basic right. Unfortunately, the Chairman gave no reasons for doing so. (para 27)

(3) The fact that the respondent was excluded only from the latter part of the complainant's cross-examination did not provide an answer to the fact that by his exclusion from even a small part of the complainant's cross-examination, the respondent was deprived of the opportunity to give instructions to his counsel on hearing what the complainant had said if he was present. The fact that the respondent's counsel was present during the hearing *'in camera'* did not provide an answer to the fact that when a person is being cross-examined on a point, an answer to one question may necessitate further questions being asked, depending on what counsel's instructions on the point are and what his client hears in court, which would not be possible with the client's exclusion from court. (para 28)

(4) The credibility of the complainant was seriously challenged. It was therefore a serious thing to exclude the respondent from even a small part of such an important part of the proceedings and thereby denying him of the rights. The respondent was thus not accorded a fair hearing at the Industrial Court. (para 30)

Bahasa Malaysia *Translation Of Headnotes*

Syarikat perayu telah mengambil responden bekerja sebagai pramugara utama. Dia didakwa melakukan salah laku seksual terhadap pengadu, yang berada dalam penerbangan pertamanya sebagai anak kapal. Setelah mendapat nasihat daripada jurulatihnya, pengadu membuat aduan bertulis. Berikutan siasatan, responden diminta menghadiri siasatan domestik, yang mana, berdasarkan keputusan majoriti, panel siasatan domestik mendapati responden bersalah atas dua pertuduhan gangguan seksual. Responden kemudiannya dibuang kerja. Tidak lama selepas itu, responden membuat representasi kepada Menteri berkenaan yang seterusnya membuat rujukan kepada Mahkamah Perusahaan di bawah s. 20 Akta Perhubungan Perusahaan 1967. Mahkamah Perusahaan, walau bagaimanapun, menolak tuntutan responden. Tidak berpuas hati, responden memohon kepada Mahkamah Tinggi untuk semakan kehakiman bagi mendapatkan perintah *certiorari* untuk membatalkan keputusan Mahkamah Perusahaan. Mahkamah Tinggi membenarkan permohonan responden yang mana diputuskan bahawa Mahkamah Perusahaan telah khilaf dari segi undang-undang, iaitu, apabila ia gagal melihat sebarang justifikasi menghalang responden daripada prosiding 'in camera' di hadapan Mahkamah Perusahaan. Mahkamah Tinggi kemudiannya membuat suatu perintah untuk mengembalikan kes kepada Mahkamah Perusahaan untuk didengar semula. Oleh itu, rayuan ini oleh perayu. Antara isu-isu yang dibangkitkan untuk pertimbangan adalah: (i) sama ada terdapat kesalahan prosedur dalam prosiding di hadapan Mahkamah Perusahaan; dan (ii) sama ada responden diberikan satu perbicaraan yang adil walaupun dia tidak dibenarkan untuk berada di dalam mahkamah semasa bahagian akhir pemeriksaan balas.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)
Oleh Clement Skinner HMR menyampaikan penghakiman mahkamah:

(1) Dalam prosiding perbicaraan, hakim yang bersidang boleh, atas alasan kukuh dan munasabah, membuat keputusan untuk mengecualikan seseorang daripada menghadiri satu-satunya prosiding. Hakim dibenarkan untuk mengecualikan orang tersebut daripada prosiding di mahkamah jika beliau mendapati seseorang itu berniat mengganggu prosiding atau melanggar mahkamah atau sesiapa sahaja yang terlibat dengan perbicaraan atau cuba untuk menakut-nakutkan saksi. Walau bagaimanapun, yang arif Mahkamah Perusahaan tidak memberi sebarang alasan atas keputusan drastik beliau. Oleh itu, terdapat kesalahan prosedur dalam prosiding di Mahkamah Perusahaan.

(2) Hak untuk perbicaraan yang adil adalah termasuk hak untuk mendengar segala yang menuduh dan sesiapa sahaja yang boleh berkata untuk menyokong tuduhan terhadapnya, supaya dia mempunyai peluang untuk menjawab. Di sini, responden telah dinafikan hak asas. Malangnya yang arif Pengerusi tidak memberikan sebarang alasan berbuat demikian.

(3) Hakikat bahawa responden dikecualikan daripada hanya bahagian akhir pemeriksaan balas pengadu tidak memberi jawapan kepada fakta bahawa dengan pengecualiannya walaupun daripada sebahagian kecil daripada pemeriksaan balas pengadu, responden tidak mendapat peluang untuk memberi arahan kepada peguamnya untuk mendengar apa yang pengadu katakan sekiranya beliau hadir. Hakikat bahawa peguam responden hadir semasa pendengaran *'in camera'* tidak memberi jawapan kepada fakta bahawa apabila seseorang sedang disoal balas tentang sesuatu, jawapan kepada satu soalan mungkin memerlukan soalan lanjut ditanya, bergantung kepada apa arahan peguam tentang sesuatu perkara dan apa yang didengar anak guamnya di mahkamah, yang tidak boleh dilakukan dengan pengecualian anak guamnya dari mahkamah.

(4) Kredibiliti pengadu telah dicabar. Oleh itu, adalah satu perkara yang serius untuk mengecualikan responden walaupun daripada sebahagian kecil daripada bahagian yang penting dalam

prosiding dan dengan itu menafikan haknya. Dengan itu, responden telah tidak diberikan satu perbicaraan adil di Mahkamah Perusahaan.

Case(s) referred to:
Chief Constable of North Wales Police v. Evans [1982] 1 WLR 1155 ***(refd)***
Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***
Kanda v. Government of Malaya [1962] AC 322 ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20

For the appellant - P Thavaselvi; M/s Zul Rafique & Partners
For the respondent - Indran K; M/s Krishna Dallumah, Manian & Indran

[Appeal from High Court, Seremban; Judicial Review No: 13-1-2009]

Reported by Shah Saharudin

JUDGMENT

Clement Skinner JCA:

Introduction

[1] We had earlier heard the appeal of Malaysia Airline System Berhad ("the appellant") against the decision of the High Court, Seremban dated 28 April 2010. By its decision the High Court had granted an order of *certiorari* to quash the award handed down by the Industrial Court, on 7 July 2008 wherein the Industrial Court held that Wan Sa'adi @ Syed Sa'adi bin Wan Mustafa ("the respondent") had been dismissed from the employment of the appellant for just cause or excuse. The High Court had also made an order remitting the case to the Industrial Court to be re-heard before another chairman.

[2] After hearing the appellant's appeal we unanimously dismissed it and affirmed the decision and order made by the High Court, Seremban. In doing so we gave our brief reasons. We said:

> In our judgment, when the Chairman of the Industrial Court ordered the proceedings to proceed in camera and excluded the Claimant/Respondent during the tail-end of the cross-examination

A of the complainant COW 2 in relation to her allegation of sexual harassment by the Claimant, we are of the firm view that a serious procedural impropriety had occurred in the proceedings. The learned High Court Judicial Commissioner was therefore correct to intervene and quash the Award of the Industrial Court and order the matter to be readjudicated before a different Chairman. We therefore affirm the decision of the Judicial Commissioner.

[3] These are our reasons for our decision.

Facts

[4] The respondent joined the appellant as a trainee flight steward in 1986. By 1992 he had been promoted to leading steward.

[5] On 8 May 2003 flight stewardess Chaik Mei Heng ("the complainant") was on duty on a Malaysia Airlines flight from Kuching to Kuala Lumpur. That was her maiden solo flight serving as crew in the Economy Cabin. The respondent was on the same flight, but he was "a paxing crew" meaning that he was not on duty but was travelling as a passenger en route to another destination for assignment of duties.

[6] The complainant alleges that during the flight she was subjected to sexual harassment by the respondent. At the termination of the flight the complainant did not raise her harassment at a debriefing for crew but she claims to have briefly mentioned the incident regarding the respondent to two other crew members, namely, Vilasenee and Murzahnurul. On 15 May 2003 the complainant informed her instructor Puan Faridah about the matter and on her advice took the matter further. On 16 May 2003 the complainant made a written complaint of sexual harassment by the respondent on 8 May 2003.

[7] Following investigation by the appellant into the complainant's complaint the respondent was asked to attend a domestic inquiry to answer two charges of sexual harassment before a panel of three members. At the inquiry the appellant called five witnesses including the complainant, Vilasenee and Murzahnurul. The respondent gave evidence at the inquiry and called one Shahan Shah bin Jauhad (another crew member).

[8] By a majority decision (the chairperson dissenting) the inquiry panel found the respondent guilty of the charges. The respondent was accordingly informed of his dismissal for misconduct on 18 November 2003.

[9] The respondent then made representation to the Minister of Human Resources who then referred the matter to the Industrial Court under s. 20 of the Industrial Relations Act 1967.

The Industrial Court Award

[10] The Industrial Court heard the respondent's case on 7 July 2008 and dismissed it.

[11] In essence the Industrial Court dismissed the respondent's claim as it found:

(i) The domestic inquiry had been properly conducted;

(ii) The appellant had proved a *prima facie* case against the respondent;

(iii) That the complainant, who was not previously acquainted with the respondent, had no motive to accuse him falsely of sexual harassment;

(iv) That the complainant would not have made such serious allegations against the respondent merely because she had been scolded and treated harshly by the respondent as he claims;

(v) There were no material inconsistencies in the complainant's evidence;

(vi) There was no delay in the complainant's report which was lodged eight days after the incident;

(vii) No adverse inference should be drawn against the appellant for not calling witnesses who had appeared at the domestic inquiry such as Vilasenee and Marzahnurul as their evidence could be found in the appellant's bundle of documents and the domestic inquiry proceedings;

(viii) The respondent had given inconsistent evidence which affected his credibility.

[12] It needs to be mentioned here that during the hearing before the Industrial Court, towards the later part of the complainant's cross-examination she complained that she was uncomfortable with the respondent's presence. The chairman of the Industrial Court then ordered that her cross-examination be conducted in camera, without the presence of the respondent, but apparently in the presence of the respondent's counsel.

The High Court Decision

[13] The respondent applied to the High Court to quash the award of the Industrial Court. The High Court allowed the respondent's application for judicial review on two principal grounds:

(i) The Industrial Court committed an error in law in the "*Wednesbury* Unreasonableness" sense in that:

(a) the Industrial Court failed to consider that there were material inconsistencies and contradictions in the complainant's testimony;

(b) the Industrial Court failed to address the dissenting decision of the chairperson of the inquiry panel, who had found that the numerous contradictions highlighted raised doubts as to the complainant's integrity;

(c) the Industrial Court failed to find as unreasonable the complainant's reasons for the eight days delay in reporting the alleged acts of harassment when it relied on the complainant's testimony, which was not made at or about the time of the incident;

(d) the Industrial Court failed to consider properly or at all that other than the complainant's evidence, there were no other witnesses called to corroborate the sexual allegations made by the complainant;

(ii) The Industrial Court committed errors of law on grounds of procedural impropriety when it denied the respondent a fair hearing for the following reasons:

(a) the learned Judicial Commissioner failed to see any justification for precluding the respondent from the *"in camera"* proceedings before the Industrial Court;

(b) the respondent was deprived of the basic right to cross-examine those of the appellant's witnesses who were called at the domestic inquiry, but were not produced as witnesses before the Industrial Court.

This Appeal

[14] The appellant submitted that the sole issue in this appeal is whether the learned Judicial Commissioner had exercised appellate power instead of a more limited review power within the parameters of the High Court's *certiorari* jurisdiction.

[15] It was the contention of the appellant that instead of confining itself to its supervisory role in judicial review proceedings the High Court had interfered with findings of fact arrived at by the Industrial Court on such matters as the credibility of the complainant, whether her allegations of sexual harassment had been corroborated, whether there had been a withholding or suppression of evidence of relevant witnesses, and whether there was delay in reporting the incident. The appellant also complained that the High Court had substituted its own views or findings for that of the Industrial Court. The appellant further contended that the High Court had erred in law and in fact when it concluded that there had been procedural impropriety during the trial at the High Court.

[16] Having heard the submissions of the parties on the matters raised before us, we formed the view that this appeal turned on one fundamental issue, namely, whether there was procedural impropriety in the proceedings before the Industrial Court. If there was, as found by the High Court, then on that ground alone the award of the Industrial Court should be quashed. If we found that there was no procedural impropriety as alleged, then we should go on to consider the other grounds raised in this appeal.

[17] In the result, we found that there was indeed procedural impropriety in the proceedings at the Industrial Court. These are our reasons for so finding.

[18] It is settled law that the award of an Industrial Court is amenable to judicial review. And it is equally well accepted that in judicial review proceedings the court is concerned not with the decision but the decision making process (see *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155).

[19] In *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 the Federal Court at p. 172 (CLJ), at p. 187 (MLJ) approved of what was said in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 where Lord Diplock had defined the three grounds on which a decision is open to challenge in judicial review proceedings to be (i) illegality (ii) irrationality and (iii) procedural impropriety.

[20] With regard to the term "procedural impropriety" Lord Diplock said (at p. 411):

> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this head covers also failure by an administrative tribunal to observe procedural rules …

[21] It can be seen therefore that the expression "procedural impropriety" also refers to failure to observe basic rules of natural justice or failing to act with procedural fairness.

[22] With regard to the term natural justice, in *Kanda v. Government of Malaya* [1962] AC 322 at p. 337 Lord Denning described the two essential characteristics of natural justice, in these words:

> [T]he rule against bias is one and the right to be heard is another. These 2 rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in two maxims: *nemo judex in cause sua*, and *audi alteram partem*. They have recently been put in the two words, impartiality and fairness. Both are separate concepts and are governed by separate considerations.

[23] In this case we are only concerned with that aspect of natural justice which concerns the right to be heard or fairness. Can it be said that the respondent had been accorded a fair hearing before the Industrial Court despite the fact that he was not allowed to remain in the court during the latter part of the complainant's cross-examination which proceeded in his absence?

[24] It was the appellant's submission that no injustice had been occasioned to the respondent by his exclusion from the proceedings because neither the respondent nor his counsel had objected to

the complainant's evidence being recorded *"in camera"* and the respondent's counsel was present during the recording *"in camera"* of the complainant's evidence. Besides, the complainant's evidence was recorded in camera only towards the end of her cross-examination. Counsel for the appellant drew our attention to the fact that a total of some ten questions only were put to the complainant after the respondent was excluded from the hearing.

[25] It was also the submission of learned counsel for the appellant that since the respondent and his counsel did not object to the proceedings being heard *"in camera"*, the respondent is now estopped from retreating from the position he had adopted at the hearing "by his election" (not to object).

[26] We do not agree with the appellant's contentions. In civil proceedings a presiding judge may for good and valid reasons decide to exclude a person from attending the proceedings. For example if the judge finds that a person is intent on disrupting the proceedings or is being offensive to the court or anyone else involved in the hearing or is trying to intimidate a witness the judge would be justified to exclude such person from the proceedings in court. The learned chairman of the Industrial Court gave absolutely no reasons for his drastic decision.

[27] If the right to be heard is to mean anything to a person, it must include a right to know what is being alleged against him and where the matter proceeds to a hearing in court, a right to a fair trial will include the right to hear everything which his accuser and anyone else may have to say in support of the accusation against him, so that he has an opportunity to answer them. Here, the respondent was denied that very basic right but unfortunately the learned chairman gave no reasons for doing so.

[28] In our judgment the fact that the respondent was excluded only from the latter part of the complainant's cross-examination does not provide an answer to the fact that by his exclusion from even a small part of the complainant's cross-examination, the respondent was deprived of the opportunity to give instructions to his counsel on hearing what the complainant had said if he was present. The fact that the respondent's counsel was present during the hearing *"in camera"* does not provide an answer to the fact that when a person is being cross-examined on a point, an

answer to one question may necessitate further questions being asked, depending on what counsel's instructions on the point are and what his client hears in court, which would not be possible with the client's exclusion from court.

[29] We find no substance in the appellant's argument based on estoppel. The record shows that the learned chairman of the Industrial Court did not hear arguments on whether to exclude the respondent or not before he made his decision and neither does the record show that the respondent or his counsel had agreed to the respondent's exclusion. We find no basis for the estoppel argument.

[30] One of the most important parts of any trial is the cross-examination of a witness because that is when the testimony and credibility of any witness is tested. This is especially so where, as in this case, the evidence-in-chief of a witness is given in the form of a witness statement which has already been formulated before the hearing date. It is also during the cross-examination of a witness that a judge has a chance to observe the responses and demeanour of a witness. In this case the credibility of the complainant was seriously challenged. It was therefore a serious thing to exclude the respondent from even a small part of such an important part of the proceedings and thereby deny him of the rights we earlier referred to.

[31] For the reasons given above we cannot say that the respondent was accorded a fair hearing at the Industrial Court. We accordingly find that the learned Judicial Commissioner of the High Court was correct to exercise his supervisory jurisdiction to quash the award of the Industrial Court and order the dispute to be remitted for rehearing before a different chairman. We accordingly dismissed the appellant's appeal and affirmed the decision of the High Court.